

## POLICY NOTE

### THE BANKRUPTCY (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2015

#### SSI 2015/80

1. The above Regulations are made by the Scottish Ministers in exercise of the powers conferred by sections 1A(1)(b) and (5), 2(8), 5(2ZA)(a)(ii), (2D) and (6A), 6(7), 7(1)(d), 11(1), 19(2), 22(2)(a) and (6), 23(1)(a), 32(9A), 40(3B), 43A(2), 43B(1), 45(3)(a), 49(3), 51(7)(a), 54(2), 54A(2), 54C(2), 54D(2)(a) and (c), 54E(2) and (5), 69, 69A, 71C, 72(1A), 72A and 73(1) of and paragraphs 5(1) and 6 of Schedule 3 to the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”) and all other powers enabling them to do so. The Regulations are subject to the negative procedure.

#### Policy Objectives

2. These Regulations amend—
- the Bankruptcy (Scotland) Regulations 2014 (S.S.I. 2014/225) (“the 2014 Regulations”),
  - the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014 (S.S.I. 2014/226) (“the Applications and Decisions Regulations”) and
  - the Bankruptcy Fees (Scotland) Regulations 2014 (S.S.I. 2014/227) (“the Fees Regulations”).

Those 3 sets of Regulations are part of a suite of secondary legislation made under powers in the 1985 Act, some of which were amended or added by the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”), to implement the 2014 Act. They will come into force on 1 April 2015, together with the changes made by these Regulations.

3. These Regulations make minor changes to those Regulations following their consideration by Parliament and feedback from stakeholders. At its meeting on 30 September 2014 the Delegated Powers and Law Reform Committee considered those Regulations, taking account of correspondence from the Scottish Government undertaking to amend the 2014 Regulations before they came into force to address certain issues identified by the Committee. In its Report<sup>1</sup> the Committee noted the undertaking, recommended other amendments to the 2014 Regulations and commented on regulation 24 of the 2014 Regulations and regulation 13 of the Fees Regulations.

4. Stakeholders, including the Institute of Chartered Accountants of Scotland (“ICAS”), submitted evidence to the Economy, Energy and Tourism Committee ahead of its meeting on 8 October 2014 providing comments on the suite of secondary legislation. These Regulations meet the undertaking to amend the 2014 Regulations and make further amendments to the 3 sets of Regulations in light of the Delegated Powers and Law Reform Committee’s consideration and comments from stakeholders. They also make minor corrections and improvements to those instruments.

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<sup>1</sup>See the DPLRC’s 52<sup>nd</sup> Report, 2014 (Session 4) Subordinate Legislation, published on 1 October 2014: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/81984.aspx>

*The Bankruptcy (Scotland) Regulations 2014*

6. Regulation 2(2) is a minor correction to meet the undertaking to amend the 2014 Regulations given by the Scottish Government. It inserts “of the 1985 Act” after “section 54D(4)(b) or (6)(b)” in regulation 19 to make clear this is a section of the 1985 Act.

7. Regulation 2(3) amends regulation 24 of the 2014 Regulations on the arrangements for sequestrations begun before 1 April 2015. Regulation 24(1) provides that, subject to exceptions in regulation 24(2), the 2014 Regulations have no effect in relation to sequestrations proceeding on a petition presented before that date or a debtor application made before that date. Regulation 2(3)(a) amends regulation 24(1)(a)(ii) (debtor applications before 1 April 2015) by substituting “is” for “was” in order to make the drafting consistent with regulation 24(1)(a)(i) (petitions presented before 1 April 2015) to avoid any doubt that a different effect was intended in each case. Regulation 2(3)(b) adds regulation 15 of and Form 26 in Schedule 1 to the 2014 Regulations (notice of proceedings to obtain authority in relation to debtor’s family home) and regulation 22 of and Forms 29 and 30 in Schedule 1 to the 2014 Regulations (moratorium) to the exceptions in regulation 24(2), so they can apply in principle in relation to sequestrations begun before 1 April 2015.

8. Regulation 2(4) inserts a new regulation 25 to provide that, with the exception of regulation 22 and Forms 29 and 30 (moratorium), the 2014 Regulations have no effect in relation to trust deeds granted before 1 April 2015.

9. Both regulation 2(3)(b) and 2(4) therefore make technical amendments to ensure that provision about the effect of the 2014 Regulations on ‘pre-1 April 2015 sequestrations and trust deeds’ aligns with the general approach to commencement of the 2014 Act as provided for in the Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No. 2, Savings and Transitionals) Order 2014 (S.S.I. 2014/261). The policy is that new arrangements following the 2014 Act should not generally apply to pre-1 April 2015 sequestrations and trust deeds, subject to specific exceptions.

10. Regulation 2(5) makes minor corrections and improvements to Forms 4, 5, 7-9, 10, 11, 12, 14-17, 22, 23, 26 and 29 in Schedule 1 either by substituting a new Form or amending the existing Form. These include minor corrections and improvements in response to points raised by the Delegated Powers and Law Reform Committee and stakeholders. Replacement Form 4 also meets the undertaking to amend the 2014 Regulations given by the Scottish Government.

11. Regulation 2(6) corrects an oversight by amending section E (winding up and receivership of business associations) of Schedule 2 (register of insolvencies) to the 2014 Regulations to add “Date of termination of appointment of office holder(s)” to the information to be included in the Register of Insolvencies maintained by the Accountant in Bankruptcy under section 1A(1)(b) of the 1985 Act.

*The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014*

12. Regulation 3(2) amends the Applications and Decisions Regulations to add a new dispensing power to provide flexibility to relieve parties of the consequences of failure to comply with a provision of those Regulations due to mistake, oversight or other reasonable cause – but not failure to comply with a provision of the 1985 Act itself.

13. Regulation 3(6) makes amendments in relation to regulation 19 of the Applications and Decisions Regulations. This is necessary to apply the power to extend time limits for a decision of the Accountant in Bankruptcy (“the AiB”) under the 1985 Act to replacing a trustee in more than one sequestration under section 28B(5) and (6)(a) of the 1985 Act, as amended by the 2014 Act, to cover the Court of Session as well as the sheriff court.

14. On 8 October 2014 the Scottish Government indicated to the Economy, Energy and Tourism Committee that it would involve external people in creating a role for independent experts in the review process. Regulation 3(7) inserts a new regulation 21A which allows the AiB to appoint independent persons to provide assistance in relation to decisions on review applications. It also allows the AiB to disclose information held about review applications to an appointed person for this purpose only.

15. Regulation 3(3) to (5) and (8) makes minor textual corrections and clarifications. Regulation 3(8)(a) replaces Form 4 to clarify when it applies, and to add the name of the replacement trustee elected at the statutory meeting. Regulation 3(8)(b) substitutes “must” for “may” in Form 5 to reflect the obligation to hold a meeting of creditors for the election of a new trustee on removal of a trustee. Regulation 3(8)(c)(i) amends Form 6 to include confirmation that the trustee consents to appointment as trustee in converting a protected trust deed into bankruptcy on the application of a member State liquidator, and space for the trustee to sign and date the form accordingly.

#### *The Bankruptcy Fees (Scotland) Regulations 2014*

16. For the same reason as noted at paragraph 7 above for the 2014 Regulations, regulation 4(a) amends regulation 13 of the Fees Regulations by substituting “is” for “was” to make the drafting of regulation 13(1)(b) consistent with regulation 13(1)(a), and provide clarity that a different effect was not intended. Regulation 4(b) discontinues fees for sequestrations begun and trust deeds granted before 1 April 2015 in respect of items 10 (certificates of discharge to debtors), 11 (certified copies of entries in the register of insolvencies), 12 (the certifying of any other document) and 13 (providing copy documents) in Part 2 of the Table of Fees in Schedule 1 to the Bankruptcy Fees etc. (Scotland) Regulations 2012.

#### **Consultation**

17. The Scottish Government and the AiB had extensive engagement with key stakeholders during the passage of the Bill for the 2014 Act.

18. In 2012 the Scottish Government consulted on its proposals for bankruptcy law reforms. Its “Consultation on Bankruptcy Reform” – <http://www.scotland.gov.uk/Publications/2012/02/6283/0> was published on 24 February 2012 and remained open until 18 May 2012. Throughout the parliamentary process for the Bill for the 2014 Act the Scottish Government also engaged with various stakeholder groups, providing them with an opportunity to contribute to the development of the Bill and the Regulations necessary to implement it, including the 2014 Regulations, the Applications and Decisions Regulations and the Fees Regulations.

19. Additionally, the AiB held a rolling programme of stakeholder events between December 2012 and August 2014. Following a presentation from the AiB at the end of each event, delegates were invited to participate in a question and answer session, allowing them to contribute to the

development of the implementing Regulations. In total, approximately 130 delegates attended these events representing a wide range of businesses and representative bodies, including: the Insolvency Practitioners Association, ICAS, Lloyds Banking Group, Credit fix, Solicitors and Money Advice (public and private sector). Further stakeholder events were held in January and February 2015, and the AiB for the Scottish Government remains open to stakeholder views about the effective working of these regulations.

20. The amendments made by these Regulations include those made in response to stakeholder comments, as noted above, for example, introducing the role of an independent expert in the review process as a result of stakeholder feedback which has been heard and acted upon.

### **Impact Assessments**

21. Given that, in the main, this instrument makes minor corrections and improvements to the 2014 Regulations, the Applications and Decisions Regulations and the Fees Regulations, a Business Regulatory Impact Assessment (“BRIA”) has not been carried out. BRIsAs were completed for each of the 2014 Regulations, the Applications and Decisions Regulations, and the Fees Regulations. The BRIsAs were published when those Regulations were made and copies can be found on the Accountant in Bankruptcy’s website at: [www.aib.gov.uk](http://www.aib.gov.uk)

22. Similarly an Equality Impact Assessment (“EQIA”) has not been carried out for this instrument, however EQIAs were completed for the 2014 Regulations, the Applications and Decisions Regulations, and the Fees Regulations, which refer, in turn, to the EQIA completed in relation to the 2014 Act. The AiB administers each bankruptcy on an individual basis and has appropriate measures in place to ensure that the collation and transmission of statistics and information regarding individuals are completed sensitively. The changes set out in these Regulations will however apply equally to all. The AiB regularly consults with stakeholders, service users and the general public on reforms to bankruptcy law to ensure that the needs of all groups of society who require to enter bankruptcy are considered and that no particular groups are disadvantaged or excluded more than others. A copy of the EQIAs can be found on the AiB website at: [www.aib.gov.uk](http://www.aib.gov.uk) and the EQIA published in relation to the 2014 Act can be found on the Scottish Government website at: [www.scotland.gov.uk](http://www.scotland.gov.uk)

### **Financial Effects**

23. The amendments made by these Regulations in the main attract no additional costs to those detailed in the financial memorandum published in conjunction with the Bankruptcy and Debt Advice (Scotland) Bill. A copy can be found at:-  
[http://www.scottish.parliament.uk/S4/Bills/Bankruptcy%20and%20Debt%20Advice%20\(Scotland\)%20Bill/b34as4-stage2-supp-fm.pdf](http://www.scottish.parliament.uk/S4/Bills/Bankruptcy%20and%20Debt%20Advice%20(Scotland)%20Bill/b34as4-stage2-supp-fm.pdf)

24. The exception would be introducing the role of an independent expert in the review process. This is a new process and the operational process is being finalised. A range of options have been considered. We do not anticipate that the process will give rise to significant additional costs. One possible approach might be to resource the process through voluntary arrangements. Evidence submitted by ICAS to the Economy, Energy and Tourism Committee ahead of its meeting on 8 October 2014, supports this view. ICAS wrote, “[i]t is unlikely that such a Committee would add cost or significant time delays to any review as it would operate in the same way as other AIB Committees (such as the Notes for Guidance Committee, Policy and Cases Committee, etc.) where the members provide their time on a voluntary basis”. It may

alternatively be possible to draw upon the expertise of some of AiB's existing cohort of external non-executive board members, which could be provided at a competitive rate, meeting any additional costs from within existing budgets.

**The Accountant in Bankruptcy on behalf of the Scottish Government**  
27 February 2015